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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re ALEXANDER M., a Person Coming Under the Juvenile Court Law.	B210147 (Los Angeles County Super. Ct. No. CK64517)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. C.B., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Jacqueline Lewis, Commissioner presiding. Affirmed.

Niccol Kording, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel and Tracey F. Dodds, Principal Deputy County Counsel for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant C.B. (mother) appeals from the juvenile court's order terminating her parental rights to Alexander M. (Alexander) under Welfare and Institutions Code section 366.26.[1] She contends that the juvenile court's failure to appoint a guardian ad litem to protect her interests prevented her from meaningfully participating in the proceeding below and resulted in a miscarriage of justice.

We hold that mother forfeited her claim on appeal concerning the juvenile court's failure to appoint a guardian ad litem. We therefore affirm the order terminating mother's parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

Alexander came to the attention of the Department of Children and Family Services (DCFS) shortly after he was born, when mother told the hospital staff that she was suicidal, did not feel she could care for Alexander, and did not want him. Mother was 17 years old at the time, and she told a children's social worker (CSW) that Daniel (father), age 27, was Alexander's father. Mother told hospital staff that father had been physically abusing her over the prior two months. But she later told a CSW that there had not been any physical abuse. Mother informed a CSW that she had left her own mother's home over a year prior because her mother's boyfriend had been sexually abusing her, and she did not like him.[2] She moved in with father and his parents, but they did not know she was a minor.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] As a minor, mother herself was the subject of a separate section 300 petition in a related case.

DCFS filed a section 300 petition on August 2, 2006, alleging mother had mental and emotional problems that prevented her from caring for Alexander and endangered his physical and emotional health and safety. At the August 2, 2006, detention hearing, mother appeared and was appointed counsel. Father also appeared and the juvenile court found that he was Alexander's presumed father. The juvenile court ordered DCFS to detain Alexander in the home of "any appropriate relative or non-related extended family member." The juvenile court ordered monitored parental visitation, family reunification services, and a study to determine whether to place Alexander with his paternal grandmother. On August 18, 2006, the juvenile court ordered Alexander placed with his paternal grandmother.

In the September 11, 2006, jurisdictional/disposition report, DCFS reported that mother had been hospitalized for "major depression with psychotic features" from August 11, 2006, to August 30, 2006, and was prescribed drugs to treat psychosis and depression. Mother appeared and was represented by counsel at the September 11, 2006, jurisdictional/disposition hearing. Mother waived her right to a trial on the issues of jurisdiction and disposition. The juvenile court found that the waiver was "freely and voluntarily made and that there [was] a factual basis for the plea." The juvenile court sustained Count B-1 of the petition[3] and dismissed all of the other counts. Mother was granted monitored visits, while father was granted unmonitored visits. DCFS was ordered to provide mother individual counseling to "address case issues and issues identified in the psychiatric assessment." The juvenile court also ordered mother to participate in "wrap around services and [a] psychiatric assessment."

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[3] Count B-1 alleged: "The child Alexander [M.'s] mother [C.B.] has mental and emotional problems including diagnosis of suicidal ideation. Further, the child's mother has been hospitalized for the evaluation and treatment of her psychiatric condition. Further, due to the child's mother's limitations, the child's mother is unable to provide regular care for the child. Such mental and emotional condition on the part of the child's mother endangers the child's physical and emotional health and safety and places the child at risk of physical and emotional harm and damage."

The December 11, 2006, interim report attached a letter from mother complaining that she had yet to start the parenting classes ordered by the juvenile court because of placements and requesting visitation with Alexander. At the hearing that same day, mother appeared and was represented by counsel. The juvenile court ordered that both parents were to have no less than weekly visits, that DCFS was to assist mother in "getting her into parenting class," and that DCFS was to "work with mother and [Alexander's paternal grandmother] to arrange for holiday visits."

In a report for the February 26, 2007, section 366.1 judicial review hearing, DCFS reported on the services mother had been receiving, including individual and group counseling, special education, and parenting classes. DCFS also reported that mother had visited Alexander once a week, but could not visit more often because Alexander was placed with his paternal grandmother in Hesperia. At the February 26, 2007, judicial review hearing, mother appeared and was represented by counsel. The juvenile court found that the case plan was necessary and appropriate and that DCFS had made reasonable efforts to enable Alexander's "safe return home." Mother was granted "up to four hours monitored visitation . . . ."

In a report for the August 10, 2007, status review hearing, DCFS reported that mother's visits with Alexander had been limited due to transportation issues, that she had only visited Alexander once in the last several months, and that, as a result, mother's bonding with Alexander had been compromised. It also reported that mother was in compliance with the case plan and had actively participated in all services offered. At the August 10, 2007, status review hearing mother appeared and was represented by counsel. The juvenile court ordered DCFS "to set up a team decision making meeting regarding [the] return of Alexander to [his] parents" and continued the matter to August 21, 2007, for a review of the results of the team meeting.

Following a continuance, in a report for the September 6, 2007, interim review hearing, DCFS reported that mother had left the group home and wanted to remain in father's home so her family could be together. DCFS further reported that a team meeting had been held and it was decided that mother would receive Regional Center

services to assist her in the care of Alexander and that mother and father would begin caring for Alexander "with overnight visits to begin on Sunday nights and . . . [Alexander] returned to [his paternal grandmother] on Tuesday night."

At the September 6, 2007, interim review hearing, mother appeared and was represented by counsel. The juvenile court ordered DCFS to assist mother with receiving Regional Center services, schooling, and parenting classes. The juvenile court found that Alexander's parents had made good progress, that there was a substantial probability Alexander would be returned to his parents by the 18-month date, and that the parents had consistently and regularly visited with Alexander.

In a report for the November 9, 2007, interim review hearing, DCFS reported that mother had been residing with father, but moved out in mid-October to live with her mother, only to return to father's home five days later. Alexander's parents visited him four times in the prior six weeks, with the visits usually lasting three days. The parents did not visit every week because they could not afford gas. During the reporting period, a CSW was required to intervene twice when mother became distressed and upset with father for not picking up Alexander, threw temper tantrums, and became verbally abusive and aggressive towards father. The CSW advised mother to seek medical treatment for her anger issues, which mother did, resulting in prescriptions for ambilify and wellbutrin. Mother was also receiving Regional Center services. Mother appeared and was represented by counsel at the November 9, 2007, hearing for a progress report which was continued to December 7, 2007.

In a report for the December 7, 2007, hearing, DCFS reported that mother had moved in with her mother because father could not provide for her and Alexander's basic needs. Mother was extremely frustrated because father had difficulty providing transportation for visits with Alexander. Father asked mother to allow the paternal grandmother to adopt and raise Alexander. Mother had unmonitored weekend visits (Saturday to Tuesday) during the prior three or four months, had become very attached to Alexander, and had obtained a car seat, clothes, shoes, and diapers for him. During one visit, mother took Alexander for emergency treatment due to strep throat that had been

misdiagnosed a few days prior. Mother was working at a fast food restaurant and planned on participating in Regional Center services. Mother appeared and was represented by counsel at the December 7, 2007, hearing and the juvenile court continued the matter to January 15, 2008.

In a report for the January 15, 2008, hearing, DCFS reported that mother's visitation with Alexander had been consistent until the end of December when mother began experiencing emotional difficulties. According to the maternal grandmother, she "5150d"[4] mother on Christmas day due to mother's "disruptive, disillusional and paranoid behaviors. . . ." Mother was hospitalized until January 9, 2007. The initial diagnosis was "schizoaffective." DCFS recommended against further reunification services for the parents due to mother's mental instability and father's lack of visitation.

At the January 15, 2008, hearing, mother appeared and was represented by counsel. The juvenile court advised that it might terminate reunification services at the next hearing and ordered monitored visits with mother.

In a report for the February 15, 2008, hearing, DCFS reported that on February 11, 2008, mother was transported to the emergency room because she was displaying "manic" behavior. According to DCFS, mother was not emotionally stable and required further psychiatric evaluation. Mother did not appear at the February 15, 2008, hearing, but she was represented by counsel. The juvenile court ordered mother's counsel to visit mother in the hospital.

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[4] We assume this is a reference to an involuntary 72-hour commitment under section 5150. That section provides in pertinent part: "When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, designated members of a mobile crisis team provided by Section 5651.7, or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation." (§ 5150.)

In a report for the March 28, 2008, hearing, DCFS reported that mother was released from the hospital on February 19, 2008, and was prescribed Zoloft. Mother refused to live in the recommended group home and instead wanted to live with a male friend. Mother had been involved in a physical altercation with two women with whom she had lived prior to her psychiatric hospitalization. Mother returned to the home of her male friend and refused to take any psychotropic medications. The male friend reported that on March 7, 2008, mother had taken his car keys, drove his car, and crashed into two other cars, a fence, and a mailbox, behavior for which she was arrested and incarcerated. DCFS concluded that mother was not emotionally stable and recommended termination of reunification services.

At the March 28, 2008, hearing mother did not appear, but was represented by counsel. The juvenile court found that there was not a reasonable probability that Alexander could be returned to his parents within the next period of review, terminated reunification services, and set the matter for a section 366.26 hearing on approval and implementation of a permanent plan and termination of parental rights. DCFS was ordered to initiate an adoptive home study immediately.

In a report for the April 25, 2008, status review hearing, DCFS reported that, following her March 7, 2008, arrest, mother was sent to Olive View and then transferred to Penmar Therapeutic Center on March 14, 2008, and placed on a "30 day [p]sychiatric hold." Her psychiatric evaluations indicated a "mood disorder." DCFS was informed on April 16, 2008, by a hospital social worker that mother would be unable to attend the April 25, 2008, hearing because she would still be hospitalized at that time. Alexander continued to do well under the care of his paternal grandmother and the adoptive home study for his grandmother had been completed.

The April 25, 2008, progress hearing was continued to May 16, 2008, and in a report for that hearing DCFS reported that mother had been personally served with notice of the section 366.26 hearing. At the May 16, 2008 hearing, mother appeared and was represented by counsel. The juvenile court found that mother had been served with notice of the July 25, 2008, section 366.26 hearing and ordered visitation for mother.

In a report for the July 25, 2008, section 366.26 hearing, DCFS recommended that the parents' rights to Alexander be terminated, that the paternal grandmother be allowed to proceed with the adoption of Alexander, and that DCFS continue to provide permanent placement services to Alexander until the adoption was finalized. The July 25, 2008, section 366.26 hearing was continued to August 18, 2008. Mother appeared at that hearing and was represented by counsel. The juvenile court terminated mother's parental rights to Alexander and freed him for adoption. Mother filed a timely notice of appeal from the order terminating parental rights.

DISCUSSION

Mother contends that the juvenile court was required, but failed, to appoint her a guardian ad litem because of her minority[5] at the time of the filing of the petition and her mental condition.[6] According to mother, the failure to appoint a guardian ad litem

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[5] "In dependency cases involving child abuse or neglect, California law requires the appointment of a guardian ad litem for a minor. (§ 326.5.) (Footnote omitted.) The same statute expressly provides that this role may be filled by either the attorney appointed by the juvenile court to represent the minor's interests, or by a court-appointed special advocate. (§§ 317, 326.5; *In re Charles T.* (2002) 102 Cal.App.4th 869 [125 Cal.Rptr.2d 868].) If an attorney is appointed to represent the minor's interests, the juvenile court need not appoint a separate guardian ad litem. (*In re Charles T.*, *supra*, 102 Cal. App. 4th at p. 879.) While the California Rules of Court permit the juvenile court to appoint a guardian ad litem to represent a dependent child when appropriate under the circumstances, they do not require such an appointment. (Cal. Rules of Court, rule 1438(f).)" (*In re Christopher I.* (2003) 106 Cal.App.4th 533, 558.)

[6] "[A] guardian ad litem should be appointed [for a mentally incompetent person] if the requirements of either Penal Code section 1367 or Probate Code section 1801 are met." (*In re Sara D.* (2001) 87 Cal.App.4th 661, 667.) A defendant is mentally incompetent under Penal Code section 1367, subdivision (a) "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." Probate Code section 1801, subdivisions (b) and (d) authorizes appointment "for a person who is substantially unable to manage his or her own financial resources or

deprived her of the ability to participate meaningfully in the proceedings involving her parental rights to Alexander.[7]

DCFS argues, inter alia, that even assuming the juvenile court was legally required to appoint a guardian ad litem under the circumstances of this case, the failure to do so is not jurisdictional and is subject to forfeiture[8] if not raised in the juvenile court. Because mother failed to raise the guardian ad litem issue at any time during the proceedings below, DCFS contends she has forfeited that contention on appeal. We agree.

"It is true that . . . a reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. (*People v. Saunders* (1993) 5 Cal.4th 580, 589–590 [20 Cal.Rptr.2d 638, 853 P.2d 1093].) (Footnote omitted.) The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. (*Saunders*, at p. 590.) [¶] Dependency matters are not exempt from this rule. (See, e.g., *In re Dakota S.* (2000) 85 Cal.App.4th 494, 502 [102 Cal.Rptr.2d 196] [failure to obtain supervising agency's

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resist fraud or undue influence" or "for a developmentally disabled adult." To warrant appointment, the "trial court must find by a preponderance of the evidence that the parent comes within the requirements of either section." (*In re Sara D., supra*, 87 Cal.App.4th at p. 667.)

[7] After the order terminating parental rights was entered, the Legislature enacted section 326.7, effective January 1, 2009, that provides: "Appointment of a guardian ad litem shall not be required for a minor who is a parent of the child who is the subject of the dependency petition, unless the minor parent is unable to understand the nature of the proceedings or to assist counsel in preparing the case."

[8] Forfeiture in this context is the loss of a right to challenge a trial court ruling on appeal by failing to preserve the challenget in the trial court. "Although the loss of the right to challenge a ruling on appeal because of the failure to object in the trial court is often referred to as a 'waiver,' the correct legal term for the loss of a right based on failure to timely assert it is 'forfeiture, because a person who fails to preserve a claim forfeits that claim. In contrast, a waiver is the '"intentional relinquishment or abandonment of a known right."' (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9 [108 Cal.Rptr.2d 385, 25 P.3d 598]; *People v. Saunders* [(1993)] 5 Cal.4th. [580,] 590, fn. 6.)" (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

assessment of prospective guardian under § 366.22, subd. (b)]; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338–1339 [63 Cal.Rptr.2d 562] [failure to request court to order bonding study]; *In re Kevin S.* (1996) 41 Cal.App.4th 882, 885–886 [48 Cal.Rptr.2d 763] [failure to challenge setting of § 366.26 permanency planning hearing when court determined that no reasonable reunification efforts were made].)" (*In re S.B., supra,* 32 Cal.4th at p. 1293.)

"But application of the forfeiture rule is not automatic. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394 [149 Cal.Rptr. 375, 584 P.2d 512]; see *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [69 Cal.Rptr. 2d 917, 948 P.2d 429] [party's failure to object in trial court does not deprive appellate court of authority].) But the appellate court's discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. (See *Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 722, fn. 17 [221 Cal.Rptr. 468, 710 P.2d 268], overruled on another ground in *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 183; *Hale v. Morgan*, *supra*, at p. 394.) Although an appellate court's discretion to consider forfeited claims extends to dependency cases (*Rosa S. v. Superior Court* (2002) 100 Cal.App.4th 1181, 1188 [122 Cal.Rptr.2d 866]; *Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1459 [118 Cal.Rptr.2d 1181]), the discretion must be exercised with special care in such matters. 'Dependency proceedings in the juvenile court are special proceedings with their own set of rules, governed, in general, by the Welfare and Institutions Code.' (*In re Chantal S.* (1996) 13 Cal.4th 196, 200 [51 Cal.Rptr.2d 866, 913 P.2d 1075].) Because these proceedings involve the well-being of children, considerations such as permanency and stability are of paramount importance. (§ 366.26.)" (*In re S.B., supra,* 32 Cal.4th at p. 1293.)

As DCFS correctly points out, the requirement of the appointment of a guardian ad litem, when applicable, is not jurisdictional and is therefore subject to the forfeiture rule discussed above. "[F]ailure to appoint a guardian ad litem is not jurisdictional and is subject to waiver if not raised in the trial court. (Cf. *Johnston v. Southern Pacific Co.* (1907) 150 Cal. 535, 539 [89 P. 348]; *In re Christopher B.* (1996) 43 Cal.App.4th 551,

558 [51 Cal.Rptr.2d 43].)" (*In re Charles T., supra*, 102 Cal.App.4th at p. 873.) "Failure to appoint a guardian ad litem may be waived [citation], and a judgment rendered in the absence of a guardian ad litem is not void, but merely voidable." (*White v. Renck* (1980) 108 Cal.App.3d 835, 840.)

In this case, mother does not dispute that she failed to raise the guardian ad litem issue with the juvenile court. Nevertheless, she contends that the forfeiture rule is not applicable in this case because mother, a minor when the petition was filed, would not have known to raise the issue with the trial court and therefore that the issue should not be deemed forfeited based on the decision in *In re M.F.* (2008) 161 Cal.App.4th 673. In that case, the mother of the infant subject to a section 300 petition was herself a minor, only fourteen years old. (*Id*. at pp. 676-677.) She was represented by counsel throughout the proceedings relating to her infant, but was not also appointed a guardian ad litem. (*Id*. at p. 679.) The mother did not contest jurisdiction and the juvenile court ordered the infant placed in foster care with the mother. (*Id*. at p. 677.) During subsequent proceedings relating to the infant, the mother ran away on two different occasions and, as a result, missed several hearings. (*Id*. at p. 677, 681.) According to the court, the mother's appointed attorney did not contest any of the findings or orders in the dependency proceeding relating to the infant. (*Id*. at p. 681.) At the section 366.26 hearing, the mother was again "AWOL" and the trial court terminated parental rights and ordered the infant placed for adoption. (*Id.* at p. 678.)

Based on the foregoing factual and procedural history, the court in *In re M.F., supra,* 161 Cal.App.4th 673 determined that the forfeiture rule did not apply. The court reasoned as follows: "We also reject the Agency's argument that [the mother's] claim has been forfeited by her failure to file a writ petition following the termination of her reunification services. The waiver rule balances the interest of parents in the care and custody of their children with that of children in expeditiously resolving their custody status. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151–1156 [65 Cal.Rptr.2d 913].) In most instances, a parent's due process interests are protected despite the application of the waiver rule because the dependency system has numerous safeguards

built into it to prevent the erroneous termination of parental rights. (*Id.* at pp. 1154–1155.)" (*In re M.F., supra*, 161 Cal.App.4th at pp. 681-682.)

"But, the waiver rule will not be applied if '"due process forbids it."' (*In re S. D.* (2002) 99 Cal.App.4th 1068, 1079 [121 Cal.Rptr.2d 518], quoting *In re Janee J.* (1999) 74 Cal.App.4th 198, 208 [87 Cal.Rptr.2d 634].) Relaxation of the waiver rule is appropriate when an error 'fundamentally undermine[s] the statutory scheme so that the parent would have been kept from availing himself or herself of the protections afforded by the scheme as a whole.' (*In re Janee J., supra*, at p. 208.) Thus, appellate courts have refused to apply the waiver rule when a guardian ad litem has been appointed erroneously, because in such cases the attorney looks to the guardian ad litem, not the parent, to exercise the right to appellate review. (*In re Joann E.* (2002) 104 Cal.App.4th 347, 353–354 [128 Cal.Rptr.2d 189]; *In re Jessica G.* (2001) 93 Cal.App.4th 1180, 1190 [113 Cal.Rptr.2d 714].)" (*In re M.F., supra*, 161 Cal.App.4th at p. 682.)

Based on the foregoing reasoning, the court in *In re M.F., supra*, 161 Cal.App.4th 673 concluded that "it would be inappropriate to apply the waiver rule here. The failure to appoint a guardian ad litem *in an appropriate case* goes to the very ability of the parent to meaningfully participate in the proceedings. For the same reasons that [the mother] needed a guardian ad litem, she was 'hardly in a position to recognize . . . and independently protest' the failure to appoint her one. (*In re S. D., supra*, 99 Cal.App.4th at p. 1080.)" (*In re M.F., supra*, 161 Cal.App.4th at p. 682, italics added.)

In this case, unlike in *In re M.F., supra*, 161 Cal.App.4th 673, mother was 17 years old at the time the petition was filed, and she turned 18 shortly after the six-month review hearing. She attended most of the hearings in the case and was represented by counsel from the outset. Moreover, during the two-year period this proceeding was pending, the record shows that mother received a vast array of medical, social, and educational services designed to assist her in resolving her behavioral issues and in reunifying with Alexander. In contrast to the 14 year old mother in *In re M.F.* whose parental rights were terminated while she was still a minor, here, mother was 18. Moreover, she was not absent for most of the important proceedings in this case, and

there is nothing in the record to indicate that the absence of a guardian ad litem in any way affected her ability to participate meaningfully in those proceedings.

This is not an appropriate case for relaxation of the forfeiture rule, because mother was not prevented from availing herself of the protections afforded by the statutory scheme that governs dependency proceedings. To the contrary, the record reveals that she thoroughly availed herself of the substantial protections afforded by the relevant statutory scheme, but that her deteriorating mental status prevented her from reunifying with Alexander. The issue of whether her mental condition warranted the appointment of a guardian ad litem, as mother now contends, was never raised with the trial court. And, her consistent participation in the dependency proceedings, and in the many services related thereto, supports an inference that she was capable of availing herself of the protections afforded under the Welfare and Institutions Code. She was at all times represented by presumably capable counsel and at no time did her counsel advise the juvenile court that mother did not understand the nature of the proceedings or was unable to assist counsel in the protection of mother's interests in the companionship, custody, control, and maintenance of Alexander. (*In re Sara D., supra,* 87 Cal.App.4th at p. 667.) Accordingly, we hold that mother forfeited her challenge to the juvenile court's failure to appoint a guardian ad litem by failing to raise the issue with the juvenile court.

DISPOSITION

The order of the juvenile court terminating mother's parental rights to Alexander is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.